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No. 82-1635

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL A. LANIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted evidence obtained by federal and state personnel either with petitioner's consent or from locations outside petitioner's landfill.

2. Whether the district court properly admitted analyses of leachate samples, nothwithstanding that the samples themselves were no longer available, when the deterioration of the samples would have prevented useful analysis by petitioner.

3. Whether the Resource Conservation and Recovery Act precludes criminal charges under the Federal Water Pollution Control Act and the Refuse Act for the discharge of pollutants from a landfill into navigable waters of the United States.

4. Whether the Federal Water Pollution Control Act and the Refuse Act were properly applied to petitioner where evidence showed that the leachate discharged from the landfill could adversely alter the biological integrity of the affected waterways.

5. Whether the district court properly instructed the jury that the defendant could be found guilty of violating the Federal Water Pollution Control Act on the basis of negligence.

6. Whether the district court properly instructed the jury that the defendant could be found guilty of violating the Refuse Act on the basis of his duties and responsibilities as a corporate officer involved in the operation of a landfill.

7. Whether the district court properly admitted the testimony of a government expert regarding a water balance analysis he performed on petitioner's landfill.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Almeida-Sanchez v. *United States*, 413 U.S. 266	8
Brady v. *Maryland*, 373 U.S. 83	8
Donovan v. *Dewey*, 452 U.S. 594	8
Lewis v. *United States*, 445 U.S. 55	10
Rakas v. *Illinois*, 439 U.S. 128	8
Rawlings v. *Kentucky*, 448 U.S. 98	8
Schneckloth v. *Bustamonte*, 412 U.S. 218	8
Sierra Club v. *Abston Construction Co.*, 620 F.2d 41	10
United States v. *American Cyanamid Co.*, 354 F. Supp. 1202, aff'd, 480 F.2d 1132	13
United States v. *Baller*, 519 F.2d 463, cert. denied, 423 U.S. 1019	14
United States v. *Batchelder*, 442 U.S. 114	11
United States v. *Biswell*, 406 U.S. 311	8
United States v. *Brady*, 595 F.2d 359, cert. denied, 444 U.S. 862	14
United States v. *Dotterweich*, 320 U.S. 277	13
United States v. *Earth Sciences, Inc.*, 599 F.2d 368	10
United States v. *Freed*, 401 U.S. 601	13

Cases—Continued Page

United States v. *Frezzo Brothers, Inc.*, 602 F.2d 1123, cert. denied, 444 U.S. 1074 ... 12

United States v. *Georgetown University*, 331 F. Supp. 69 13

United States v. *Hendershot*, 614 F.2d 648. 14

United States v. *Herndon*, 536 F.2d 1027 .. 9

United States v. *Interlake Steel Corp.*, 297 F. Supp. 912 13

United States v. *Loud Hawk*, 628 F.2d 1139, cert. denied, 445 U.S. 917 9

United States v. *Luschen*, 614 F.2d 1164, cert. denied, 446 U.S. 939 14

United States v. *Mackin Const. Co.*, 388 F. Supp. 478 13

United States v. *McDaniel*, 538 F.2d 408 .. 14

United States v. *Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 12

United States v. *Park*, 421 U.S. 658 13

United States v. *Picariello*, 568 F.2d 222 .. 9

United States v. *United States Steel Corp.*, 328 F. Supp. 354, aff'd, 482 F.2d 439, cert. denied, 414 U.S. 909 13

United States v. *Watson*, 423 U.S. 411 8

United States v. *White Fuel Corp.*, 498 F.2d 619 13

United States v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86 13

United States v. *Williams*, 583 F.2d 1194, cert. denied, 439 U.S. 1117 14

Statutes and rules: Page

Refuse Act of 1899:
33 U.S.C. 407 ..... 1, 11
33 U.S.C. 411 1
Federal Water Pollution Control Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*:
33 U.S.C. 1311(a) 1, 11
33 U.S.C. 1318 7
33 U.S.C. (& Supp. V) 1319(c) 11
33 U.S.C. 1319(c)(1) 1, 11
33 U.S.C. (Supp. V) 1362(6) 10
33 U.S.C. 1362(12) 11
33 U.S.C. (Supp. V) 1362(14) 10
33 U.S.C. 1362(19) 11
Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) 6901 *et seq.* 9
42 U.S.C. 6902 10
42 U.S.C. (& Supp. V) 6903 10
42 U.S.C. 6904(3) 10
42 U.S.C. 6905(a) 10
42 U.S.C. (Supp. V) 6928(d) 10
Fed. R. Evid.:
Rule 702 ..... 7, 14
Rules 702-704 7

Miscellaneous:

3. J. Weinstein & M. Berger, *Weinstein's Evidence* (1982) 14

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet App. A3) was entered on January 7, 1983. A petition for rehearing was denied on February 3, 1983 (Pet. App. A4). The petition for a writ of certiorari was filed on April 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a four-week jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 10 counts under the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act"), 33 U.S.C. (& Supp. V) 1311(a) and 1319(c)(1), and five counts under the Refuse Act of 1899, 33 U.S.C. 407 and 411, in connection with the dis-

charge of the pollutant leachate[1] into navigable waters of the United States without a permit. Petitioner was sentenced to a one-year term of imprisonment, a three-year term of probation, and a fine of $200,000 (Pet. App. A5-A8). The court of appeals affirmed (*id.* at A1-A3).

1. The evidence at trial showed that in 1974 petitioner became the president, part owner, and chief operator of Moyer's Landfill, Inc., a Pennsylvania corporation engaged in the business of operating a waste dump in Montgomery County, Pennsylvania (2/8/82 Tr. 51-52; 2/12/82 Tr. 174-182; 2/22/82 Tr. 23).[2] The following year he applied to the Pennsylvania Department of Environmental Resources (DER) for a solid waste disposal permit allowing him to operate Moyer's Landfill as a solid waste disposal facility (2/12/82 Tr. 71-72) and for a water quality management permit (2/8/82 Tr. 43-78). The latter application included a leachate collection system at the landfill, which consisted of basins or impoundments to collect the leachate and pump it back into the landfill. The collection system was intended to prevent the discharge of leachate into two waterways adjacent to the landfill (*id.* at 57-71, 80-81, 102). A Pollution Incident Prevention Plan (PIPP) accompanying petitioner's application for a water quality management permit described the measures petitioner was required to take to prevent leachate discharges. The PIPP included adequate maintenance and daily inspections of the leachate management system. *Ibid.* In addition, petitioner also was required to haul leachate from the landfill to a nearby municipal wastewater treatment fa-

[1] Leachate is the contaminated liquid created by decomposition at a landfill and by rain water percolating through the landfill.

[2] "Tr.," "S-I," and "S-II," prefixed by a date, refer to the transcripts of the trial and the two suppression hearings, respectively.

cility, which allowed him to dispose of leachate at no cost (*id.* at 60, 76-77; 2/10/82 Tr. 139-143, 149).

In November 1976 petitioner received a water quality management permit and a solid waste disposal permit from DER (2/8/82 Tr. 76-90). The DER permits did not allow the discharge of leachate, and at no time did petitioner obtain a permit from the Environmental Protection Agency (EPA) allowing him to discharge any leachate (2/10/82 Tr. 139-143).

2a. At the pretrial hearing on petitioner's motion to suppress evidence obtained by EPA and DER personnel on visits to Moyer's Landfill and the vicinity, the government presented testimony showing that the collection basins near the west and south sides of the landfill were not located on the landfill property itself (12/14/81 S-I 1.3-1.9). Leachate samples and photographs obtained by EPA personnel from areas outside the landfill were offered to prove the leachate discharges alleged in various counts of the indictment (*id.* at 1.36-1.57, 1.111-1.114; 12/16/81 S-I 3.8-3.16; 2/22/82 Tr. 40-53). Evidence obtained by DER employees from such locations was offered to prove the leachate discharges alleged in other counts (12/15/81 S-I 2.4-2.7, 2.63-2.75). The district court ruled that all evidence obtained outside the landfill property would be admissible (2/4/82 S-II 2-5).

b. Evidence from the landfill property itself, including leachate samples, photographs, and statments by petitioner, was obtained by EPA employees on November 28, 1978, and January 9, 1980 (12/14/81 S-I 1.45-1.50, 1.112-1.113). Those leachate samples and photographs were not offered to prove a particular discharge alleged in the indictment, but rather were introduced to prove that leachate was a pollutant.

On the two occasions when EPA employees actually entered the landfill property, they properly identified themselves to petitioner and explained the purpose of

their visits (12/14/81 S-I 1.37-1.46, 1.114). When they asked petitioner for permission to enter the landfill premises, he readily agreed. *Ibid.* At no time was petitioner threatened or coerced in any way, and he did not object to the presence of the EPA representatives (*ibid.*; 12/16/81 S-I 3.56-3.59).

On January 9, 1980, petitioner was asked by an EPA engineer whether he hauled leachate from the landfill to the municipal sewage treatment plant. Petitioner responded that he never hauled any leachate because it was not necessary (12/14/81 S-I 1.47-1.49). Petitioner was in his office at the landfill during this conversation; he was not in custody (12/16/81 S-I 3.56-3.59) and did not show a hesitancy or unwillingness to speak with the EPA engineer (12/14/81 S-I 1.50).

In addition, two DER employees visited the landfill area in 1980 to make observations and take leachate samples from the landfill property itself (12/14/81 S-I 1.50; 2/8/82 Tr. 40; 2/10/82 Tr. 170). One of these DER employees explained that from February until July of 1980 he was responsible for periodically inspecting Moyer's Landfill and other facilities to determine if they were being operated in compliance with their DER permits (12/15/81 S-I 2.63-2.75). Each time the DER inspector visited Moyer's Landfill he properly identified himself and informed petitioner or one of petitioner's employees that he was there to conduct an inspection. *Ibid.* During those inspections the DER employee examined the landfill and took leachate samples when necessary. *Ibid.* Petitioner never objected to any of these inspections or attempted to keep the DER agent off the landfill premises (*id.* at 2.65). Two other DER solid waste specialists who had inspected the landfill also described how they conducted their inspections and stated that petitioner never objected to their inspections or tried to keep them off his propety (*id.* at 2.46-2.48, 2.95, 2.98-2.100).

At the conclusion of the suppression hearing the district court found that petitioner had consented to the visits by the EPA and DER personnel who entered the landfill property (2/4/82 S-II 6-12). The court also ruled that the defendant's statements were admissible. *Ibid.* Furthermore, the district court found that DER personnel were not required to obtain search warrants because Moyer's Landfill was subject to regular inspections by DER under state law and operated in an industry heavily regulated by state authorities. *Ibid.*

3. At trial the government presented the testimony of several witnesses, including private citizens, EPA personnel, and DER employees, who observed leachate discharges in 1978 and 1980 into the waters described in the indictment (2/8/82 Tr. 40-201; 2/9/82 Tr. 16-72, 178-215; 2/10/82 Tr. 16-136, 170; 2/22/82 Tr. 27-81). In addition to describing their observations, some of those witnesses also identified photographs of what they saw (2/8/82 Tr. 40, 173; 2/9/82 Tr. 26, 178; 2/10/82 Tr. 86, 99, 170; 2/22/82 Tr. 27). On some occasions the witnesses obtained samples of leachate that later were analyzed for their chemical content (2/8/82 Tr. 40; 2/10/82 Tr. 86, 99, 170).

The witnesses also described the poor condition of the leachate collection basin near one of the waterways. Pipes that were supposed to carry the leachate from the basin were often disconnected, and the pumps were frequently inoperable (2/8/82 Tr. 103; 2/9/82 Tr. 43; 2/22/82 Tr. 34, 43). A hole in the side of that basin in 1978 and 1980 allowed leachate to escape into a creek (2/10/82 Tr. 89; 2/22/82 Tr. 43-52).

Leachate discharges also were seen coming from the collection basin near the south side of the landfill into the other affected waterway. Leachate was observed flowing from a pipe that was not connected to this basin (2/9/82 Tr. 27-43). That pipe was found to be in the same position in both 1978 and 1980. *Ibid.*

In addition to the condition of the leachate collection basins, evidence of petitioner's negligence included his failure to haul any leachate to the municipal sewage treatment plant until March of 1980, when the federal investigation began (2/10/82 Tr. 147-151; 2/22/82 Tr. 28). Petitioner knew that he was supposed to haul leachate off-site and was aware that his consultant told EPA in 1977 and 1978 that leachate was being hauled to the municipal treatment plant (2/26/82 Tr. 103-118; 3/2/82 Tr. 50-64). Petitioner also allowed customers to dump sludges containing a substantial amount of liquid at the landfill, thus aggravating the leachate problem (2/22/82 Tr. 81-96, 150-178).

Evidence that leachate was a pollutant included the observations of witnesses who described the particular physical characteristics that distinguished it from the water in the affected waters (2/8/82 Tr. 103-110; 2/9/82 Tr. 39-50, 180-194; 2/10/82 Tr. 89-91, 176-180; 2/22/82 Tr. 29-52). Samples of leachate obtained from and around the leachate collections basins also were analyzed by laboratory personnel at EPA and DER and, on one occasion, by a private laboratory (2/8/82 Tr. 112-120, 175-184; 2/10/82 Tr. 86-112, 176-190; 2/12/82 Tr. 18-70, 91-169; 2/22/82 Tr. 8-22). A comparison of these analyses with EPA data showing the chemical components of the waterways involved indicated that leachate discharges would tend to create a "septic zone" in which aquatic life could not survive (*id.* at 97-127). Some leachate samples also contained "priority pollutants" as defined by EPA and other substances at levels normally found in sewage (2/12/82 Tr. 33-55).

To show the magnitude of the leachate problem at Moyer's Landfill the government presented the testimony of an environmental engineer, Gary Brown, whose areas of expertise included environmental engineering, landfill design, and leachate management (2/22/82 Tr. 16-21). He described the results of a water

balance study of Moyer's Landfill showing the total leachate and the excess leachate (*i.e.*, the amount of leachate exceeding that which could be contained by the landfill and its collection system) that were generated at the landfill in 1978, 1979, and 1980 (2/23/82 Tr. 16-167; 2/24/82 Tr. 11-106, 135-142). Moreover, using assumptions and facts proposed by the defense, Brown provided revised estimates. *Ibid.* Petitioner introduced expert testimony challenging the water balance study, and he testified extensively himself. After allowing the defense to cross-examine the environmental engineer about the basis and methodology of this study, the district court ruled that the results of his study were admissible under Fed. R. Evid. 702-704 (2/24/82 Tr. 127-131).

4. The court of appeals, in an order specifically enumerating each of the contentions raised by petitioner, affirmed the judgment of the district court (Pet. App. A1-A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

1. Petitioner claims (Pet. 12-15) that the evidence obtained from the warrantless environmental inspections should have been suppressed. This claim is without merit.

The operation of a landfill is a business closely and pervasively regulated by the state and federal government. Indeed, all such facilities required to have a permit, including petitioner's, were subject to regular inspections by DER (12/14/81 S-I 1.143-1.144, 1.157-1.158), and petitioner was aware of that regulatory authority from the time he first became associated with the landfill (12/16/81 S-I 3.59). In addition, the FWPCA (33 U.S.C. 1318) specifically empowers EPA

to conduct warrantless inspections. In these circumstances, as in *Donovan* v. *Dewey*, 452 U.S. 594, 600 (1981), the state and federal legislatures have "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the * * * [governmental] regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

At all events, even apart from this regulatory authority, petitioner's motion to suppress was properly denied. Certain of the evidence at issue was obtained from locations outside the boundaries of Moyer's Landfill. Since petitioner had no reasonable expectation of privacy in these areas (see *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)), he cannot seek suppression. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980). With respect to the evidence seized from the landfill property, petitioner allowed state and federal personnel to enter the premises and make their inspections, and the district court correctly found that such searches were consensual (2/4/82 S-II 6-12). See *United States* v. *Watson*, 423 U.S. 411, 424 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973).

2. Petitioner also argues (Pet. 15-17) that the analyses of leachate samples should have been suppressed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because the samples themselves had not been preserved for his analysis.

The leachate samples in this case were discarded in accordance with normal operating procedures after they had been analyzed (2/4/82 S-II 17-18, 109-110). In addition, petitioner was sent copies of the EPA analyses prior to destruction of the samples (*id.* at 134-135).

Thus, no effort was made by the government to withhold evidence from petitioner or gain a tactical advantage over him.

Moreover, the natural chemical decomposition of these samples would have rendered them useless for petitioner to analyze. As explained in the testimony of EPA and DER laboratory supervisors, testing for the materials involved in this case would have to be done (depending upon the practicular material being analyzed) within periods of six hours to six months of sample collection (2/4/82 S-II 49, 53-59, 84, 110-118). Beyond those periods examination of the samples would not have accurately indicated their contents at the time they were collected (*id.* at 83-84). Therefore, when petitioner was indicted in October 1981, the samples—the last of which had been collected in early 1980—would have been far beyond the point at which their analyses could have furnished petitioner with any exculpatory evidence. And, of course, petitioner was allowed to cross-examine the experts who conducted the tests in order to probe their methodology and the reliability of their results.

Accordingly, the unavailability of the original samples was not a reason for suppressing the chemical analyses of those samples. See *United States* v. *Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *United States* v. *Picariello*, 568 F.2d 222, 227 (1st Cir. 1978); *United States* v. *Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976).

3. Petitioner next asserts (Pet. 17-21) that the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. V) 6901 *et seq.*, is the exclusive statute applicable to landfills and therefore preempts the FWPCA and the Refuse Act under which he was charged. This assertion is unfounded.

By its terms, the RCRA applies to the storage, transportation, treatment, and disposal of solid waste

(including hazardous waste). See, *e.g.*, 42 U.S.C. (& Supp. V) 6902, 6903, 6928(d). While "disposal" may include the discharge of a solid or hazardous waste into water, 42 U.S.C. 6904(3), the RCRA is not the only statute that encompasses such pollution, and it was not intended by Congress to displace other environmental regulatory statutes. To the contrary, 42 U.S.C. 6905(a) specifically provides that "[n]othing in this chapter [the RCRA] shall be construed to apply to * * * any activity or substance which is subject to the Federal Water Pollution Control Act."[3] In this case, the FWPCA and the Refuse Act clearly proscribe pollutant or refuse discharges into the navigable waters of the United States, and petitioner's activities—the discharge of the pollutant leachate into waterways without a permit—fit squarely within those proscriptions.[4]

Nor does the "rule of lenity" compel a different result. Petitioner has pointed to no "statutory ambiguity" that would support lenity here. *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). Petitioner "has no constitutional right to elect which of two applicable federal statutes

[3] We also note, as petitioner acknowledges (Pet. 21 n.11), that the FWPCA (33 U.S.C. 1362(6)) defines "pollutant" to include "solid waste." This statutory definition would be rendered meaningless if, as petitioner urges, all aspects of solid waste are exclusively governed by the RCRA.

[4] Petitioner further contends (Pet. 18) that the FWPCA definition of "point source" (33 U.S.C. (Supp. V) 1362(14)) does not mention landfills. The listing of point sources upon which petitioner relies, however, is merely illustrative and, as Section 1362(14) expressly states, the statute "includ[es] but [is] not limited to" those examples. The leaky leachate collection system at Moyer's Landfill falls well within the generic definition of statutory source as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." See *Sierra Club* v. *Abston Construction Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).

shall be the basis of his indictment." *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979).

4. Petitioner argues (Pet. 21-22) that the FWPCA requires a showing of adverse impact upon receiving waters. Actual damage to the environment, however, is not an element of an offense under 33 U.S.C. (& Supp. V) 1311(a) and 1319(c)(1). Rather, the FWPCA broadly prohibits the addition of pollutants to the waters of the United States. 33 U.S.C. 1362(12). Of course, for a substance to be a pollutant, it must have a tendency to harm or alter the integrity of a waterway. 33 U.S.C. 1362(19). In this case the government introduced expert testimony showing that the leachate discharges from Moyer's Landfill possessed substances in concentrations capable of adversely altering the biological integrity of the affected waterways (2/22/82 Tr. 97-127). Therefore, the evidence did show that leachate was a pollutant, and thus its discharge without a permit violated the FWPCA.[5]

5. Petitioner contends (Pet. 22-26) that "gross negligence—the functional equivalent of willfulness" (*id.* at 23)—is the minimum standard necessary to establish a violation of the FWPCA. The Act, however, imposes criminal liability upon "[a]ny person who *willfully or negligently* violates [its provisions]" (33 U.S.C. (& Supp. V) 1319(c); emphasis added). Furthermore, petitioner has pointed to nothing in the legislative history of the Act to indicate that the clear language of the statute implies a standard of gross negligence. And the

[5] Petitioner's argument regarding the Refuse Act also appears to turn on the necessity of showing harm (Pet. 22 n.12). That Act proscribes the discharge "from the shore * * * [of] any refuse matter of any kind or description whatever * * *." 33 U.S.C. 407. Thus, it makes no mention of a requirement that harm be shown. At all events, as discussed above, the government's evidence at trial was sufficient to demonstrate such harm.

fact that Congress failed to give a specific statutory definition to such a well-understood term as "negligen[ce]" certainly does not support petitioner's reading that the Act requires gross negligence.

Conceding that "[t]here are no federal cases construing the Clean Water Act precisely on point" (Pet. 23), petitioner seeks to rely (*id.* at 24-25) on *United States* v. *Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (E.D. Pa. 1980). That case, however, does not suggest that gross negligence is required under the FWPCA; the court simply noted that willfullness may be imputed to a defendant because of grossly negligent conduct (487 F. Supp. at 857). More relevant here is the decision of the Third Circuit in *United States* v. *Frezzo Brothers, Inc.*, 602 F.2d 1123 (1979), cert. denied, 444 U.S. 1074 (1980), in which the court of appeals upheld a conviction under the FWPCA for the negligent discharge of pollutants. The court in *Frezzo* specifically noted that the defendant's abatement facilities were negligently maintained, and it accepted the government's theory of the case, as the jury had been instructed, that the Act is violated by a negligent discharge (602 F.2d at 1129-1130).

6. Contrary to petitioner's characterization (Pet. 26-28), the district court did not instruct the jury that they could convict petitioner under the Refuse Act based merely upon his position as a responsible corporate officer and without regard to mens rea. Rather, the district court specifically stated that the government had to prove beyond a reasonable doubt "not only that [petitioner] was an officer and responsible official in Moyer's Landfill Incorporated, but also that [he] failed to seek out and remedy the violations when they occurred, or failed to implement measures that would ensure that such violations would not occur" (3/3/82 Tr. 179). The district court also told the jury that they could not find the petitioner guilty of the Refuse Act vi-

olations unless they concluded that he was the responsible corporate officer and that the alleged discharges occurred through his willfullness or negligence. *Id.* at 182-183. Accordingly, there are no grounds for petitioner's contention that the instructions allowed him to be convicted because of his status as a corporate officer and regardless of his intent.[6]

7. Lastly, petitioner argues (Pet. 29-30) that the district court erred in admitting the "water balance" analysis of the government's expert, Gary Brown, because that methodology had not previously been accepted by a court. However, petitioner offers neither reason nor

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[6] We also note that petitioner had an affirmative duty to detect and prevent leachate discharges as set forth in the permit application (2/8/82 Tr. 68-71) and that he was actively involved in running the landfill and knew about the leachate problem (2/25/82 Tr. 16-19).

Because the district court did not give strict-liability instructions to the jury, it is unnecessary to consider petitioner's further argument that strict liability of an individual under the Refuse Act is unconstitutional. The lower federal courts have construed the Refuse Act to establish a public welfare or regulatory offense that imposes a strict-liability standard. See *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974); *United States* v. *Mackin Const. Co.*, 388 F. Supp. 478, 481 (D. Mass. 1975); *United States* v. *American Cyanamid Co.*, 354 F. Supp. 1202, 1205 (S.D.N.Y. 1973), aff'd, 480 F.2d 1132, 1133 (2d Cir. 1973); *United States* v. *Georgetown University*, 331 F. Supp. 69 (D.D.C. 1971); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970), aff'd, 482 F.2d 439 (7th Cir.), cert. denied, 414 U.S. 909 (1973); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 914-915 (N.D. Ill. 1969). This Court has consistently upheld strict-liability statutes for regulatory offenses like that in the Refuse Act. See *United States* v. *Park*, 421 U.S. 658 (1975); *United States* v. *Freed*, 401 U.S. 601 (1971); *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964); *United States* v. *Dotterweich*, 320 U.S. 277 (1943). In light of the authorities construing the Refuse Act to be a strict-liability statute, the district court's instructions were unduly favorable to petitioner.

authority to support his view that the introduction of expert evidence is limited to that which has previously been used in court, and the Federal Rules of Evidence clearly do not require such a static and rigid test.

Regardless of whether the correct standard for the introduction of expert evidence centers on general acceptance or sufficient reliability,[7] Brown's trial testimony shows that the water balance method was admissible here. That method, developed in the early 1970s for EPA, is commonly used and relied upon by experts in Brown's field to determine the amount of leachate generated by landfills (2/23/82 Tr. 29-30). In several states the water balance method is required as part of landfill designs to justify the size of a leachate treatment or management system. *Ibid.* With respect to the methodology he employed in his study of Moyer's Landfill, Brown testified that he analyzed all of the factors that are commonly considered when using the water balance method (2/23/82 Tr. 38-91). Accordingly, the district

[7] Prior to the adoption of Fed. R. Evid. 702, the proponent of expert testimony was required to show that the expert's technique or scientific theory was generally accepted in his field. The issue whether that requirement is retained by Rule 702 has evenly divided the six circuits that have considered it. See 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[03] at 702-16 (1982). The Sixth, Ninth, and District of Columbia Circuits still require proof of general acceptance. See, *e.g.*, *United States* v. *Hendershot*, 614 F.2d 648 (9th Cir. 1980); *United States* v. *Brady*, 595 F.2d 359 (6th Cir.), cert. denied, 444 U.S. 862 (1979); *United States* v. *McDaniel*, 538 F.2d 408 (D.C. Cir. 1976). The Second, Fourth, and Eighth Circuits, on the other hand, have adopted a more flexible approach requiring the trial judge to find only that the scientific technique or principle is sufficiently reliable. See, *e.g.*, *United States* v. *Luschen*, 614 F.2d 1164, 1169 n.3 (8th Cir. 1980), cert. denied, 446 U.S. 939 (1981); *United States* v. *Williams*, 583 F.2d 1194 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979); *United States* v. *Baller*, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975).

court did not err in admitting Brown's expert testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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